STATE OF MICHIGAN

COURT OF APPEALS

STACIE MEREDITH ROSSINI-GIBSON,

Plaintiff-Appellant,

v

GREGORY SCOT DYKEMA-GIBSON,

Defendant-Appellee.

UNPUBLISHED
April 19, 2007

No. 272614
Ottawa Circuit Court
LC No. 02-043892-DM

STACIE MEREDITH ROSSINI-GIBSON,

Plaintiff-Appellant,

v

GREGORY SCOT DYKEMA-GIBSON,

Defendant-Appellee.

No. 274631
Ottawa Circuit Court
LC No. 02-043892-DM

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

In this divorce action, plaintiff appeals as of right the August 4, 2006 decision of the trial court, rendered after a bench trial, awarding the parties joint legal and physical custody of their two minor children. Because the trial court properly determined that an established custodial environment existed with both parties and its findings as to the statutory "best interest" factors were not against the great weight of the evidence, we affirm.

Plaintiff and defendant were married in 1997, and had two children during the course of their marriage--twins, born April 23, 2002. Plaintiff filed for divorce, seeking sole physical custody of the children and defendant filed a counter-claim for divorce, also seeking sole physical custody of the children. A consent judgment of divorce was entered August 6, 2003, awarding the parties' various marital assets and granting the parties joint legal custody of the children. As to physical custody, the judgment provided: "Plaintiff and Defendant shall have

temporary joint physical care and custody of the two minor children pending the outcome of the current custody investigation. . .". The judgment of divorce further provided that physical custody during the week was to be arranged by agreement of the parties, and the parties would alternate weekends and major holidays. The matter of child support was reserved until further order of the court.

A bench trial regarding physical custody of the children began on August 30, 2005 and continued on several dates, finally concluding on March 10, 2006. The trial court thereafter entered an opinion and order, finding that an established custodial environment existed with both parties, and granting the parties joint physical custody of the minor children. Plaintiff now appeals.

MCL 722.28 provides:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

There are thus three different standards of review applicable to child custody cases. The clear legal error standard applies where the trial court errs in its choice, interpretation, or application of the existing law. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). Findings of fact are reviewed pursuant to the great weight of the evidence standard. In accord with that standard, this court will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *Id.* Discretionary rulings, including a trial court's determination on the issue of custody, are reviewed for an abuse of discretion. *Id.*

On appeal, plaintiff first argues that the trial court erred in failing to find an established custodial environment with plaintiff, when the children had lived primarily with her for the last three years. We disagree.

The Child Custody Act, MCL 722.21 *et seq.*, governs child-custody disputes between parents. In deciding a child custody matter, a trial court must first determine whether an established custodial environment exists. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). A trial court's finding regarding the existence of an established custodial environment is a factual finding, and is thus subject to review under the "preponderance of the evidence" standard. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004).

"The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." MCL 722.27(1)(c); *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000). "An established custodial environment is one of significant duration 'in which the relationship between the custodian and child is marked by qualities of security, stability and permanence.'" *Mogle*, *supra*, quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). An established custodial environment can exist in more than one home. *Mogle*, *supra* at 197-198.

Here, the trial court found that an established custodial environment existed with both parties, noting that a temporary order had been in effect in this matter for more than three years, which provided the parties with "approximately the same amount of parenting time." In reaching its decision, the trial court further noted that defendant averaged three days per week of parenting time with the children. The evidence supports the trial court's determination.

Plaintiff undisputedly spent the first two years of the children's lives at home caring for them. According to defendant, when the parties initially separated (when the children were approximately two and a half), he and plaintiff enjoyed almost equal amounts of parenting time with the children. When plaintiff moved from Holland to Muskegon, defendant indicates that plaintiff unilaterally reduced his parenting time. Plaintiff disagreed with defendant's representation of the parenting time schedule. In any event, both parties agree that beginning at a disputed point in time and continuing through the custody trial, the children spent every Tuesday overnight, every other Thursday overnight, and every other weekend with defendant. This schedule resulted in the children spending at least two overnights per week with defendant.

Testimony was additionally presented that defendant and plaintiff both attended the children's sports events, that plaintiff regularly volunteered in the children's classroom, and that defendant attended school field trips with the children. The testimony further established that while exercising parenting time with plaintiff, the children spent time with neighbors and friends and while exercising parenting time with defendant, the children spent time with defendant's family and friends in the neighborhood where defendant resided. It was additionally testified to that both plaintiff and defendant had a loving relationship with the children.

Based on the above, it appears that over an appreciable time, the children naturally looked to both parents for guidance, discipline, the necessities of life, and parental comfort. We cannot conclude that the evidence preponderates in the opposite direction.

Plaintiff next argues that the trial court erred when it inappropriately weighed several of the best interests factors against plaintiff, when the great weight of the evidence indicated that she had an advantage over defendant with regard to those factors. We disagree.

Pursuant to MCL 722.27(1):

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> (a) Award the custody of the child to 1 or more of the parties involved. . .
>
> ***
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> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances. . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established

custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

A trial court determines the best interests of the children by looking at the sum total of the twelve statutory factors set out in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). A trial court's findings with regard to each of the factors is subject to review under the great weight of the evidence standard and should be affirmed unless the evidence clearly preponderates in the opposite direction. *Thompson, supra,* at 363-364.

For purposes of this appeal, plaintiff challenges the trial court's findings with respect to six of the twelve factors. As to factor (b), the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any, the trial court found the parties to be equal. Plaintiff focuses her allegation of error on the religious aspect of this factor, contending that while the parties agreed to raise the children in the Catholic faith, she is the only one to attend and take the children to church services. Plaintiff also points out that testimony was presented indicating defendant would enroll the children in a public, rather than parochial, school if he could not afford parochial school tuition. However, testimony was also provided that defendant was highly involved in the children's parochial school activities and agreed that their interests would be best served if they were to continue attending Corpus Christi parochial school. The trial court's finding was thus not against the great weight of the evidence.

The trial court also found the parties equal with respect to factor (c), the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs. Plaintiff does, as acknowledged by the trial court, have a significantly higher annual income than defendant (over $100,000 vs. $10,000-13,000 in reported income) and maintains medical and dental insurance for the children through her employer. Defendant, on the other hand, undisputedly relies a great deal on his parents for financial assistance. Nevertheless, we, as did the trial court, find it significant that plaintiff admittedly lied on her job application in order to obtain her high-paying job. Whether plaintiff later admitted to her employer the falsity of certain information does not negate the fact that she attempted to/did obtain her job based on a significant lie concerning a college degree she did not have. Moreover, according to plaintiff, both parties filed for bankruptcy shortly after the judgment of divorce was entered and testimony was presented that raised questions concerning both parties' handling of funds provided by plaintiff's adoptive father for and earned in a business venture. The great weight of the evidence thus supports finding the parties equal on factor (c).

Factor (d) considers the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. The trial court gave a slight advantage to defendant on this factor, noting that plaintiff has moved several times and at least twice placed her current home up for sale. Defendant had moved only once since the parties separated. Given plaintiff's moves to several different locations in a relatively short amount of time, the evidence supports giving defendant a slight advantage with respect to the continuity of a home environment.

The trial court found that factor (f), the moral fitness of the parties involved, weighed in favor of defendant. As pointed out by plaintiff, defendant engaged in an extra-marital affair with

the children's childcare provider and was involved with a married (but allegedly separated) woman during the course of the custody trial. These facts obviously do not reflect well on defendant's moral fitness. However, other facts borne out by the trial testimony show that plaintiff fell short in the moral fitness department as well and, in fact, raised moral concerns that could well be seen as outweighing defendant's questionable choice of partners.

Evidence at trial suggested plaintiff may also have engaged in an extramarital affair. More importantly, there was significant testimony indicating that plaintiff was and had been dishonest on many levels. Plaintiff admitted to claiming to have a college degree in recent job applications, including the one submitted for her present job, when she had not even finished college. There was also evidence that during a custody matter concerning her child from a previous relationship (twelve at the time of trial in this matter), plaintiff made allegations of abuse (found to be unsubstantiated) on the part of the child's father, and took the child to Arizona when an unfavorable ruling was issued, necessitating the child's return to Michigan through police intervention. Defendant also testified that after the custody matter was concluded, plaintiff created a baby book for the child that completely eliminated the child's father and placed defendant in his place, and some question was raised as to whether plaintiff was attempting to change the child's last name.

Defendant also related that plaintiff unilaterally reduced his parenting time with the children when she moved some distance away, and testified of incidents where he was attempting to pick up the parties' daughter at a gymnastics facility and plaintiff snuck the child out to avoid the pick-up, arriving at plaintiff's home to pick up the children and them not being there, and difficulties over holiday parenting time. Additional evidence revealed that plaintiff had also enrolled the children in a different school in violation of a court order. Given plaintiff's history of dishonesty, in particular concerning her children, the children witnessing and/or being part of the dishonesty at times, and her attempted manipulation of events, we are satisfied that the evidence preponderates in defendant's favor on this factor.

Finally, plaintiff challenges the trial court's finding of a slight advantage to defendant with respect to factor (h), the home, school, and community record of the children. The trial court based its finding on this factor in part on the fact that the children have a relationship with defendant's extended family whereas plaintiff is estranged from her parents. The trial court recognized that plaintiff was more involved in extracurricular activities with the children, but attributed this involvement in part to what it considered her "manipulation to complicate and exclude Defendant's parenting time and similar efforts."

As pointed out by plaintiff, she spends a significant amount of time in the children's classroom. Plaintiff has also enrolled the children in many extracurricular activities and both parents attend the children's sporting events. The children, by all accounts, do well in school and appear to enjoy friendships in the communities where their parents reside. While we would find that the evidence preponderates in finding the parties equal on this factor, such a finding would not change the overall decision of the trial court. This is necessarily so, as weighing the sum of all the factors, the parties would still be equal with respect to most factors.

Plaintiff's remaining argument on appeal concerns the trial court's reliance on evidence that was allegedly irrelevant. "Relevant evidence means evidence having any tendency to make

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

Plaintiff first objects to the court's consideration of issues and testimony concerning a prior custody case involving her child from a previous relationship. According to plaintiff, evidence of her actions with the child six to eight years ago is not probative of how the parties' children have developed while in her care. However, as acknowledged by plaintiff, a court may hear evidence of how another child is raised in determining the best interests of other children. Moreover, where, as here, a parent's credibility and honesty are placed at issue, that parent's honesty and conduct in a prior custody matter could be deemed probative of whether she is being honest in the present custody matter and whether her actions did/could undermine her ability to appropriately parent the minor children.

Plaintiff also takes issue with the trial court's consideration of the testimony of Dr. David Winstrom, who mediated the custody matter concerning plaintiff's oldest child, and Robert Jaehnig the Friend of the Court employee involved in that custody determination. These witnesses testified as to plaintiff's actions in the prior custody matter and presented opinions as to plaintiff's credibility at the time of that matter. Dr. Winstrom, in fact, testified that he had previously opined that plaintiff's dishonesty was a personality characteristic. This testimony could be relevant as to whether plaintiff remains a dishonest person or could change. In any event, were the testimony concerning the prior custody case of questionable relevance, both witnesses testified that they had no direct knowledge of the present matter and neither expressed an opinion as to where the parties' children should be placed. The admission of the testimony was thus harmless and did not unfairly prejudice plaintiff. See, *People v Leach*, 114 Mich App 732, 737; 319 NW2d 652 (1982). The same holds true as to the testimony of plaintiff's ex-husband and the father of her oldest child, Mark Sokolow, who testified as to certain actions of plaintiff concerning their daughter that would suggest she is not a credible person.

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Bill Schuette